

The Rules of the Game

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2019-03-02T11:16:01

This was another week quite to the taste of German constitutional phariseism: the most direful things keep happening all around, in the UK House of Commons, in the US House of Representatives, in the Supreme Court in Madrid, spectacles of democratic and constitutional self-destruction of a dimension we've rarely seen before. Oh, aren't we glad to have our fine *Grundgesetz*, some may have sighed while watching these events from a supposedly safe distance, silently sending praise to the Lord for the fact that we are not like those people.

Those who indulge in this sort of self-complacency should immediately familiarize themselves with an article published last Thursday in the FAZ, written by one of my personal favourites in contemporary German constitutional law, the eminently sharp and eloquent Christoph Schönberger from Constance. In the Federal Republic of Germany, according to Schönberger, a "creeping erosion of democracy" is underway, less visible and less spectacular than Kaczyński, Orbán and Trump, but not altogether incomparable. The German case of democratic decay does not happen on the open political stage, but is set in motion somewhere far down in the "machine room of power".

Schönberger counts four instances of recent damage deliberately done to German democracy: 1) The way the rules of procedure of the *Bundestag* were manipulated to keep the [office of opening the constituent session](#) from falling to the AfD, 2) the [increase of state party financing](#) at the behest of cash-strapped Social Democrats, basically justified with nothing but "because we can", 3) the half-baked and hypocritical "reform" of the [parliamentary questioning of the government](#), 4) and finally the stubborn refusal to [reform the electoral law](#) despite the foreseeable explosion of the number of seats in the *Bundestag*.

That stuff is, by itself, all tremendously technical and hardly suited to arouse much passion outside the community of hard-core constitutional law nerds. In Schönberger's view, however, it becomes a democracy problem because the Coalition formerly known as Grand by Christian Democrats and Social Democrats has been operating the machine levers of power in the aforementioned way: the two major parties of the old Federal Republic with their long since illusory claim to each represent half of the political spectrum and thus the whole together. "The parties of the governing coalition out of pure egoism try to prolong the status quo of the former Federal Republic into the future. Out of weakness, they damage elementary foundations of democratic power competition and functioning parliamentarism for the sake of short-term retention of power."

+++++A Note from FU Berlin+++++

Please note the Call for Papers for a workshop on ["European Responses to the Decay of the Rule of Law and Human Rights Protections in Turkey: Exceptional or](#)

[*symptomatic?*](#)" organised by Dr. Esra Demir-Gürsel (Post-doctoral Researcher at Freie Universität Berlin) and Prof. Basak Cali (Hertie School of Governance).

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I think Schönberger is indeed onto something here. The examples listed by him may be dismissed as rather petty in comparison to the much more egregious cases of Poland, Hungary, UK, USA. German democracy will definitely not perish because the constituent session of Parliament will henceforth be opened by the longest standing member instead of the eldest. But that is not the point. The point is that Christian and Social Democrats change the political rules of the game with a simple majority.

The Christian/Social Democrat government used to be called "the Grand Coalition" because it was formed by parties that normally oppose each other as government and opposition and, when for a change they decide to join forces, are able to muster a constitutional supermajority. They don't anymore, though. Not by a long shot. The CDU and the SPD nowadays are just two other medium-sized parties among many other small and medium-sized parties. Their alliance is in no way grander than any other coalition. They have no more right to change the rules of the game than any other coalition with a simple majority. And yet they did.

Premium on the legal possession of power

Some rules of the game of political competition are enshrined in the constitution and can't be changed but by a two-thirds majority. But by no means all. The nitty-gritty details of party law, parliamentary law, electoral law, all this is ordinary federal law. Which can be enacted and amended by a simple parliamentary majority.

As the frightening example of Poland shows, a simple majority under certain circumstances is all it takes to turn the entire constitutional order upside down. Kaczyński's PiS party never commanded a constitutional majority, and yet it managed (with the help of the president) to lay waste to large parts of the institutional set-up of the Polish constitutional order, with the constitutional court as its first and most prominent victim. Now, they basically own the rules of the political game as a Schmittian premium on the legal possession of power and use them, basically unconstrained, to get rid of whatever law they find constraining their power.

In a functioning democracy, you just don't do that kind of thing. There is an understanding that the majority won't change the rules of the game over the head of the opposition just because it can. That informal convention is based on the experience that the majority of today is the minority of tomorrow and vice versa, and sanctioned by the public that will punish any violation as a political scandal of the greatest order.

Schönberger's findings are that these conventions have already started to erode in Germany. That observation can be explained: In the current legislative period, it is not so clear any more who is actually the majority and who is the minority, who is

the government and who is the opposition. The SPD is somehow both, and so are the Greens (via the second chamber, the *Bundesrat*). And everyone agrees that the AfD must be kept out at all cost. The situation is confusing to an extent that two parties who jointly change the rules of the game at the expense of the others may just simply get away with it because no-one notices and no-one cares.

Now let's assume for a minute that one day the AfD will come into the possession of a parliamentary majority, perhaps in alliance with the Bavarian CSU and the emerging nationalist "*Werteunion*" wing of the CDU. They wonder how they could use that majority to finally finish off the "traitors to the people". It won't be long before their lawyers find the answer: In principle, the entire arsenal of ordinary constitutional law is open to them, from the Federal Constitutional Court Act to the Parties, Deputies and Federal Election Act. And when someone shows up and complains that it is undemocratic to change the rules of the game with a simple majority and over the heads of everyone else – then they will just grin broadly and say: boohoo! You did the same thing to us, remember? You only whine because it's now you who gets hit. All your constitutionalism is merely political. You say: rules of the game. We say: majority. Watch us.

Hard times

In **Poland**, if you allow me a bit of constitutional phariseism, the times are still way worse than here. [TOMASZ KONCEWICZ](#) gives an insight into what the Polish Constitutional Tribunal, some four years after the beginning of the constitutional conflict, looks like on the inside today. Not a pretty sight at all.

In the **United Kingdom**, it looks like the decision on deal or no-deal Brexit will be postponed until the last moment and at the same time existentially exacerbated. [JACK SIMSON CAIRD's](#) outlook for the vote in the House of Commons on Wednesday was outdated by the Prime Minister's advance the day before in terms of the course of events, but not in substance.

In **Germany**, the Federal Fiscal Court has denied the anti-globalist NGO Attac its tax exemption as a charity. As far as the outcome of the case is concerned, [ANNA LEISNER-EGENSPERGER](#) agrees with the tax judges: Attac, like Icarus, has come too close to the sun of party politics, and that has melted the wax of their charitable wings away. In terms of the legal criteria of non-profit status, however, the Court got it all wrong.

The **German** Federal Constitutional Court will have to decide on the legislative compromise on the prohibition of advertising for abortions (§ 219a StGB) after a norm control motion by the opposition parties. [ALEXANDER THIELE](#) is skeptical about attempts to unravel political compromises by means constitutional law like these, and about the instrument of the abstract norm control procedure in general.

In **Italy**, the Constitutional Court has recalibrated its tense relationship with the European Court of Justice in terms of interpretation and application of fundamental

rights. [ORESTE POLLICINO and GIORGIO REPETTO](#) explain what this decision is about and what consequences it might bear.

In **Germany**, the AfD has successfully applied for a temporary injunction against the Federal Office for the Protection of the Constitution, according to which the Office may no longer call the right-wing party a "test case" for surveillance for the time being. [KLAUS GÄRDITZ](#) has looked into the reasoning of the Administrative Court of Cologne and finds it unconvincing.

India and **Pakistan** are toeing the line of (nuclear?) war right now in the most alarming manner. At the same time, the hostile countries also argue under international law, namely before the ICJ about the question of whether the right to consular access to prisoners also applies if the detainee is a spy. [ADEEL HUSSAIN](#) reports.

Last week's decision of the **German** Federal Constitutional Court against the disenfranchisement of people with disabilities continues to cause controversy. Our own [ANNA VON NOTZ](#) vigorously questions the premise that the act of voting must be in person and excludes representation. [MARTEN BREUER](#) contrasts the Karlsruhe decision with the position of the UN Disability Rights Committee and asks who should have the last word between constitutional and international law in this matter.

Regarding the ongoing debate on gender parity in Parliament in **Germany**, [FRAUKE BROSIUS-GERSDORF](#) considers a quota to be unavoidable in order to do justice to the equal opportunity mandate of the Grundgesetz, but recommends to start with the nomination of candidates for direct election instead of the voting list.

Elsewhere

The [Strasbourg Observers Blog](#) announces the results of its annual survey of the best and worst ECtHR judgements. The worst is the decision *Sinkova* (fried eggs over the flame at the grave of the unknown soldier in **Ukraine**), which I commented on [here](#).

[MARK MANCINI](#) reflects on the spectacular revelations of the former Attorney General of **Canada** about the disregard of Prime Minister Trudeau's people towards the rule of law.

[OLIVIER BEAUD](#) recommends critical reading of the *Conseil d'Etat's* latest report on citizenship against the background of the Yellow West protests in **France** and wonders what business the Council of State has to address such a political matter in the first place.

[FRANCESCO MEDICO](#) praises the verdict of the Labour Court of Turin, which improves the position of precariously employed delivery persons in **Italy**.

[MARIOLINA ELIANTONIO](#) and [SASCHA HARDT](#) consider the member poll of the Cinque Stelle party on the waiver of the immunity of the **Italian** Interior Minister Salvini to be an abuse of direct democracy.

[TOMI TUOMINEN](#) describes how the **Finnish** Constitutional Committee deals with the Ultra Vires control on the ESM case.

[JULIANO ZAIDEN BENVINDO](#) compares the inauguration of **Brazilian** President Bolsonaro with that of Donald Trump.

That's it for this week. All the best!

Max Steinbeis

